Supreme Court, U. S.
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In the Supreme Court of the United States

No. 78-1591 Term

COMMONWEALTH ex Rel. THERESA PAULINSKI, JAMES F. RICKARD and PATRICIA K. FITZPATRICK,

Petitioners

vs.

MICHAEL C. ISAAC and SCHWARTZ-SILLS AGENCY,

Respondents

PETITION FOR WRIT OF CERTIORARI DIRECTED TO THE SUPREME COURT OF PENNSYLVANIA

ALLEN N. BRUNWASSER,
Attorney for Petitioners

903 B Grant Building,
Pittsburgh, Pennsylvania 15219

Murrelle Printing Co., Box 100, Sayre, Pa. 18840
Tel. (717) 882-0401

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Opinions Below

IN THE SUPREME COURT OF THE UNITED STATES

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PETITION FOR WRIT OF CERTIORARI DIRECTED TO THE SUPREME COURT OF PENNSYLVANIA

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Theresa Paulinski, James F. Rickard and Patricia K. Fitzpatrick respectfully present this petition for allowance of certiorari to the Supreme Court of Pennsylvania:

REFERENCE TO OFFICIAL AND UNOFFICIAL REPORTS OF THE OPINIONS DELIVERED IN THE COURTS BELOW

The October 5, 1977 Opinion of Court of Common Pleas of Allegheny County, Pennsylvania, Judge (now Administrative Judge of the Civil Division) John P. Flaherty,

Jr. declaring the so-called Pittsburgh City Court unconstitutional is reported in 379 A.2d 760 and a copy is appended to this petition (1a).

The January 25, 1979 Opinion of the Supreme Court of Pennsylvania reversing that decision is presently unreported and a copy has been appended to this petition (13a).

A letter notification that a petition for reargument has been denied is appended to this petition (27a).

JURISDICTION

Petitioners challenged their criminal prosecutions by state habeas corpus in which the right of the committing Magistrate to hold office was attacked as a violation of the 5th and 14th Amendment due process right to a fair tribunal since the Magistrate was appointed and removable at the will of the Pittsburgh Mayor who had publicly announced he was directing criminal prosecution of the class to which Petitioners belonged.

They also claimed the power of the Executive to remove Judicial violated the doctrine of separation of powers within the meaning of the 5th and 14th Amendments to the Constitution of the United States.

The date of the judgment sought to be reviewed was dated and entered by the Supreme Court of Pennsylvania on January 24, 1979.

On January 31, 1979, Petitioners filed a petition for reargument which the Supreme Court of Pennsylvania denied by a letter dated and entered February 28, 1979.

Jurisdiction to petition the United States Supreme Court for certiorari to the Pennsylvania Supreme Court is founded upon 28 U.S.C. 1257 (3).

STATEMENT OF QUESTION PRESENTED FOR REVIEW

Are criminal defendants deprived of their Fifth and Fourteenth Amendment rights to a fair tribunal when the committing Magistrate who takes the criminal information, issues process for their arrest and sets bond for their release is appointed by and removable at the sole will of the City Mayor who appointed him especially when this Mayor has publically declared his personal desire that the class to which these Defendants belong be vigorously prosecuted?

CONSTITUTIONAL PROVISIONS, STATUTES AND ORDINANCES INVOLVED

This petition involves the 5th and 14th Amendments which have been reproduced in relevant part in the Appendix (28a).

The statute involved is 53 Purdon Statutes 22261 which says:

> "The police power for taking information, making arrests, and preservation of the peace, heretofore vested in the mayor and five police magistrates, shall hereafter vest in the mayor and not less than five nor more than eight police magistrates, as shall be designated by ordinance, all of whom shall not be of the same political party; to be appointed by the mayor, subject to the approval of the select council in such districts of the city as shall by ordinance be designated, whose term of office shall be during good behavior and until a successor shall be appointed and approved. Said magistrates shall receive an annual salary, to be fixed by councils, and *shall serve for the term of the mayor appointing them, but subject to removal by him.* 1901, March 7, P.L. 20, art. XVI, §1; 1909, April 1, P.L. 83, §3; 1927, April 13, P.L. 200, §1; 1955, Aug. 9, P.L. 313, §1." (Emphasis supplied.)

CONCISE STATEMENT OF THE CASE CONTAINING THE FACTS MATERIAL TO THE CONSIDERATION OF THE QUESTION PRESENTED

On September 23, 1975, three criminal defendants petitioned the President Judge in the Court of Common Pleas of Allegheny County, Pennsylvania for a writ of habeas corpus.

In part relevant to this petition, they challenge their preliminary hearing before City Court Magistrate Stephen P. Laffey who had been appointed by and was removable at the uncontrolled will and discretion of elected Mayor Pete Flaherty (R. 3a-R. 12a*).

The issue of impartiality was first raised in paragraph 11 of that petition (R. 10a) when Petitioner said:

> "11. That the President Judge is respectfully requested to take judicial knowledge that the City of Pittsburgh Police bring practically 100% of their cases to the City Court because they know that the Magistrates there with probably only one exception, Magistrate Troiano, will do exactly what they desire regardless of the merits.
>
> As a result, the operation of the City Court deprives each and every defendant and has deprived your petitioners of the right to an impartial magistrate and due process of law as defined by Article 1, Sections 1, 19 (sic, should be 9) and 25 of the Pennsylvania Constitution and the 5th and 14th Amendments to the Constitution of the United States and as a result the Court should be abolished—".

* "R" references are to the record filed in the Pennsylvania Supreme Court.

On February 27, 1976, President Judge Ellenbogen assigned the case to Judge John P. Flaherty, Jr.

This issue was briefed and argued many times before Judge Flaherty in the Common Pleas Court of Allegheny County, Pennsylvania, not only in re this case but on behalf of other criminal defendants who, through Petitioners' present counsel, raised the problem on their own behalf in separate proceedings.

The Pittsburgh Mayor had declared open war on Pittsburgh massage parlors. He announced his plans on the radio and television plus discussed it in the newspapers.

He later had a special ordinance (No. 29 of 1976) enacted to enforce his power in this area. Although not relevant to this appeal, the ordinance was subsequently declared unconstitutional by a three-judge panel sitting in Allegheny County Common Pleas Court with one lead opinion, a concurring opinion and a dissenting opinion. The City of Pittsburgh has appealed.

Petitioners were employees at one of these parlors and appreciated, together with others similarly situated, the danger of having the Mayor's magistrates find probable cause, decide whether to issue a non-arrest citation or a freedom revoking warrant of arrest, authorize search warrants and decide if they should be executed in the daytime or at night, and decide how high or low their bond should be and how long they could be held for "administrative processing" before a custody terminating arraignment.

On October 5, 1977, Judge Flaherty declared the so-called City Court and its magistrates unconstitutional. In doing so, he observed:

> "Relators' petition alleges that they have been denied their right to due process of law as guaranteed by both the Pennsylvania and United States Constitutions because the City Magistrates have been appointed by the Mayor of Pittsburgh and are therefore subject to his political policies in enforcing the particular laws relators are charged with violating." (Lower Court Opinion, page 4, 4a).
>
> * * *
>
> ". . . yet the Charter of the City of Pittsburgh . . . provides for the appointment of magistrates, and, inferentially, for their removal." (Lower Court Opinion, pages 7 and 8, 8a).

Petitioners re-raise the issue beginning on page 5 of their Appellees' brief filed in the Pennsylvania Supreme Court at Nos. 229, 230, 234 & 248 March Term, 1977 when they ask:

> "Do Article 1, Sections 1, 9 and 25 of the Pennsylvania Constitution and the 5th and 14th Amendments to the Constitution of the United States, all of which define the Doctrine of Separation of Powers, prohibit a judicial officer who can be removed without cause and at the whim of the Executive?"

In discussing that issue, they cited the very cases they are now citing for the approval of the Supreme Court of the United States.

However, the Pennsylvania Supreme Court did not answer this question, but, in fact, ignored it completely in its January 24, 1979 Opinion (13a).

Petitioners' January 31, 1979 petition for reargument attempted to remedy this omission by requesting that the previously raised issues of separation of powers, and an impartial magistrate, be formally adjudicated in a written opinion which also tells them if the decision is being made on State or Federal grounds or both.

But the Pennsylvania Supreme Court declined to do it and, thus, this petition for certiorari is respectfully presented to correct this omission.

REASONS FOR ALLOWANCE OF THE WRIT

The 5th and 14th Amendments mandate an impartial and subject to no outside control judicial officer.

Petitioners respectfully suggest that a committing magistrate whose job is subject to the uncontrolled whim of the appointing City chief executive does not have this necessary independence. *Humphrey's Executor v. U.S.*, 1934, 295 U.S. 602, 624, 55 S.Ct. 869, 872; *Weiner v. U.S.*, 1958, 357 U.S. 349, 352, 78 S.Ct. 1275, 1277; *Marbury v. Madison,* 1803, 1 Cranch 137, 162.

The absolute right to a de novo trial in the Criminal Division of Allegheny County Common Pleas Court does not revoke this valued right at the criminal preliminary hearing level. *Ward v. Borough of Monroeville,* 1972, 93 S.Ct. 80, 83, 409 U.S. 57, 61; *Withrow v. Larkin,* 1975, 95 S.Ct. 1456, 1464, 421 U.S. 35, 46.

Petitioners' research has failed to disclose a United States Supreme Court case directed at state judicial-executive separation of powers. However, petitioners respectfully suggest that the decision of the Pennsylvania Supreme Court is contrary to the cases cited in this brief and should be reversed.

They respectfully suggest that control of a judicial officer by the executive is a fundamental and basic attack against a fair, independent and impartial judicial officer.

CONCLUSION

Petitioners respectfully request the Supreme Court of the United States to grant certiorari.

Respectfully submitted,

(s) Allen N. Brunwasser

ALLEN N. BRUNWASSER,

Attorney for Petitioners

APPENDIX

IN THE COURT OF COMMON PLEAS
OF ALLEGHENY COUNTY, PENNSYLVANIA
CIVIL DIVISION

No. 307 September 1975
No. 57 July Term, 1976

COMMONWEALTH EX REL., THERESA PAULINSKI, JAMES F. RICKARD and PATRICK K. FITZPATRICK,

vs.

MICHAEL C. ISAAC and SCWARTZ-SILLS AGENCY

OPINION

FLAHERTY, J.

Before the Court is a Petition for a Writ of Habeas Corpus. On August 11, 1975, the relators were arrested and brought before City Magistrate, Stephen P. Laffey, and charged with certain misdemeanors. On August 21, 1975, after a preliminary hearing before Magistrate Laffey, the relators were bound over for the grand jury, and are presently released on bail. The petition alleges that they, ". . . are restrained of their liberty . . ." by the bondsman and that, ". . . the entire proceeding is an absolute nullity . . ."

because the police magistrate in question, as well as all others not in office when the new Pennsylvania Constitution of 1968 took effect, are serving illegally and in violation of the Constitution of the Commonwealth of Pennsylvania.

The two questions before the Court are whether the relators are sufficiently restrained of their liberty so that a Writ of Habeas Corpus lies, and, if so, is the City Magistrate in question sitting in violation of the Constitution of Pennsylvania?

The Writ of Habeas Corpus is an ancient remedy, and one which has always been recognized as a touchstone of our rights against an illegal restraint upon one's liberty. The only issue presented in an application for a Writ of Habeas Corpus is whether a prisoner is restrained of his liberty by due process. In this case the relators are free on bail and not confined to an institution.

Being released from actual confinement on bail does not mean that one is free from restraints on one's liberty. The conditions of bail limit relators to move about only within the confines of the county. They are not as free as an ordinary citizen. Certainly, if all citizens were suddenly subjected to similar limitations, there would be a public outcry against such totalitarian restriction. Being released on bail, in terms of the limitations set upon an individual's movements, can be well analogized to being out on parole, or on furlough from prison. In these instances, the individual is not, in fact, in jail, yet he is still under the restrictive supervision of authorities. The Federal Courts having jurisdiction in Pennsylvania would allow habeas corpus for a parolee; *U.S. ex rel Rybarik v. Maroney,* 406 F.2d 1055, appeal after remand 435 F.2d 1292 (3d Cir. 1969); and

for one on furlough from prison: *U.S. ex rel. Geisler v. Walters,* 510 F.2d 887 (3d Cir. 1975).

In other Third Circuit cases, *U.S. ex rel. Webb v. Court of Common Pleas of Philadelphia County,* 516 F.2d 1034 (3d Cir. 1975), and *U.S. ex rel. Russo v. Superior Court,* 483 F.2d 7 (3d Cir. 1973) U.S. Cert. den. 414 U.S. 1023, the defendants were free on bail awaiting retrial in state court. In both cases, the Court held that "when a serious violation of a personal right was in question (in these cases, double jeopardy), there is no reason sufficient to subvert [the purpose of habeas corpus] by forcing appellant to condition assertion of his right upon conviction . . ." *Russo, Id.* at 12, and that therefore, in their then present status of being out on bail, the relators had a standing to petition for habeas corpus.

Pennsylvania Courts have also held the right to Petition for Habeas Corpus to be a sacred one. In a case predating the above federal cases, the Supreme Court held that the writ "may be molded to suit the exigencies of any particular case." *Commonwealth ex rel. Levine v. Fair,* 394 Pa. 262, 146 A.2d 834 (1958). Citing *Commonwealth v. Gibbons,* 9 Pa. S. 527, the Court emphasized that the common law writ was and is much broader than the habeas corpus act of February 18, 1785, 2 Sm. L. 275, sec. 13. Then, waxing eloquent, the Court said:

> "There is no locked door which may not be opened by the key of habeas corpus, there is no stone wall which may not be pierced by it, there is no enclosure which may not be entered by the person bearing this writ, which is now accepted as the greatest and most important remedy known to jurisprudence and which Blackstone called 'the most celebrated writ in

English law.' (Blackstone Comm. p. 128). Nor does one need to search through the books for a precedent for its application . . . the principle of the right to untrammeled freedom of action is still the fixed star in the sky of the English-speaking world. Hence, *no matter what may be the situation or how involved the circumstances, any person who claims he is illegally imprisoned or restrained of his liberty may have such claim inquired into by a competent Court, and, if his claim is found to be well grounded, he will be discharged and freed of such restraint.*" (Emphasis supplied.)

It is the Court's belief, based upon the principles stated above, that relators in the instant case are being subjected to a restraint of their freedom sufficient to sustain the right to petition for habeas corpus.

Is habeas corpus an appropriate remedy to question the Constitutionality of the Pittsburgh City Magistrates?

Habeas corpus is directed to the legality of the detention then in effect. Relators' petition alleges that they have been denied their right to due process of law as guaranteed by both the Pennsylvania and United States Constitutions because the City Magistrates have been appointed by the Mayor of Pittsburgh and are therefore *subject to his political policies* in enforcing the particular laws relators are charged with violating. Thus, the question of whether the City Magistrates are legally sitting is extremely relevant to the instant case, since it is their very existence which is alleged to be a violation of the relators' rights.

The issue could be framed as whether or not the City Magistrates have jurisdiction or authority over relators in

connection with the preliminary hearing and the setting of bail. Obviously, if these magistrates have been illegally appointed, they have no such jurisdiction or authority, and the relators have been illegally detained.

It is an ancient and well-established principle in Pennsylvania that habeas corpus will lie where a Court has no jurisdiction over the person of the defendant. *Geyger v. Stoy*, 1 Dalt. 135, 1 L.Ed. 70 (Pa. 1785), *Commonwealth ex rel. Townsend v. Burke*, 63 A.2d 77, 361 Pa. 35, Cert. den. 71 S.Ct. 286, 340 U.S. 915, 95 L.Ed. 661 (1949). This is particularly the case where constitutional rights have been invaded so as to have made the proceeding a nullity and to have rendered the trial court without jurisdiction. *Commonwealth ex rel. Sleighter v. Banmiller*, 139 A.2d 918, 392 Pa. 133 (1958). Likewise in Federal Court, habeas corpus has been recognized as an appropriate remedy to question the authority of the governmental body holding relator. *Weber v. U.S.*, 288 F. Supp. 491 (E.D. Pa. 1968).

The only issue presented in an application for a Writ of Habeas Corpus is whether one has been restrained of his liberty by due process of law and every citizen has the right to the protective cloak of the judiciary before being restrained of his sacred right of liberty. Quite obviously, if these magistrates have been illegally appointed, they are not part of the judiciary, and the relators have been illegally restrained in liberty they would otherwise have.

After years of clamor and debate having to do with the nature of the Pennsylvania Judiciary, Article V of the Constitution of 1874 was repealed and the present Judiciary Article was adopted on April 23, 1968. The amended

Article V established a "unified judicial system", and Section 1 of Article V is set forth as follows:

> "The judicial power of the Commonwealth shall be vested in a unified judicial system consisting of the *Supreme Court*, the *Superior Court*, the *Commonwealth Court, courts of common pleas, community courts, municipal and traffic courts in the City of Philadelphia, such other courts as may be provided by law* and *justices of the peace*. All courts and justices of the peace and their jurisdiction shall be in this unified judicial system." (Emphasis supplied.)

The omission of the Magistrates of the City of Pittsburgh is glaring.

The new article instituted significant reform in the structure of the judiciary of our Commonwealth, including the creation of a new Appellate Level Court, the Commonwealth Court, and most significantly in relation to the instant case, a sweeping change in the old justice of the peace system. Section 7 created justice of the peace courts with one justice for each Magisterial District. These districts were to be set up by the Supreme Court of Pennsylvania in consultation with the judges of each judicial district. The result was the reduction of the number of justices of the peace from over 5000 to under 600. A number of provisions were designed to free the justices of the peace from undue influences and pressures, thus, a regular salary was provided for, as opposed to the previous system of fees for each case going directly to the justice of the peace, or "squire" as is the colloquial title of a justice of the peace. Direct election of each justice was mandated, as was a set of educational requirements. Clearly, it was the intent of Article V to set up a wholly new system of the minor judiciary in the Commonwealth of Pennsylvania, as well as to consolidate and unify the courts administering justice within our Commonwealth. Section 7 specifically provides that, ". . . there shall be one Justice of the Peace in each Magisterial District . . . ," and provides for only two specific exceptions to this Rule. The City of Philadelphia and any locality where a Community Court has been established. There is no *mention of the City of Pittsburgh* as an exception. Relating to the City of Pittsburgh, Section 21 provides as follows:

> "Upon the establishment of Magisterial Districts pursuant to this article and schedule, and *unless otherwise provided by law*, the police magistrates, including those serving in the Traffic Court, the Housing Court and the City Court *shall continue as at present*. Such magistrates shall be part of the unified judicial system and shall be subject to the general supervisory and administrative authority of the Supreme Court. Such magistrates shall be subject to the provisions of this article and schedule regarding educational requirements and prohibited activities of justices of the peace." (Emphasis supplied.)

It should be noted that the term "Magistrate" and the term "Justice of the Peace" are, and always have been interchangeable in Pennsylvania. *The Borough of Throop v. Matyassi*, 82 D. & C. 499. Indeed, the districts over which Justices of the Peace preside are termed "Magisterial Districts" in the Constitution itself, thus, any artificial distinctions between "Magistrate" and "Justice of the Peace" are for all purposes useless.

Section 6 called upon the General Assembly to, ". . . establish classes of Magisterial Districts wholly on the basis

of population and population density and (to) fix the salary to be paid Justices of the Peace in each class." This was done for Allegheny County, *including the City of Pittsburgh,* by the Act of December 2, 1968, P.L.—No. 359, 42 P.S. 1401 et seq.

Section 13 of Article V provides for the *election* of judges and Justices of the Peace, and further provides that the *Governor* of Pennsylvania has appointment power to fill vacancies, and only then until the next election. Nowhere does it appear in the Constitution that the *Mayor* of the City of Pittsburgh has any appointment power relating to Justices of the Peace.

Interestingly, Article V gives the Supreme Court power to temporarily reassign justices of the peace to other districts, and to prescribe the general rules governing practice procedure in the conduct of all Courts and justices of the peace. There are no exceptions. Thus, to have a City of Pittsburgh police magistrate, *appointed* by the *Mayor* of Pittsburgh, assigned to, let us say, Greensburg in Westmoreland County, is an anomaly to say the least.

Section 18 provides for the suspension, removal, discipline and compulsory retirement of justices of the peace in accordance with the rules of procedure promulgated by the Supreme Court of Pennsylvania. There is no other provision for an alternative procedure, yet the Charter of the City of Pittsburgh, in direct contravention of this section, provides for the appointment of magistrates, and, inferentially, for their removal.

The only reference the Constitution makes to the City of Pittsburgh Magistrates appears in Section 21, Supra, which states that they, ". . . *shall continue as at present.*" (emphasis supplied).

In construing the Constitution, the Court must view the purpose of the article in question as stated in the article, and interpret the plain words used in the Constitution to judicially determine the intent. The reading of the Judiciary Article discloses no reference to the City of Pittsburgh Magistrate's Court, except in Section 21 where it provides that the ". . . *police magistrates,* including those serving in the Traffic Court, the Housing Court and the City Court *shall continue as at present.*" (emphasis supplied). This is entirely consistent with the provision of the article that the existing justices of the peace serve out their terms. Those police magistrates serving at the time of the adoption of the article could serve out their terms, but the provision cannot be construed to have preserved the system. In other words, Section 21 "grandfathers" the City of Pittsburgh magistrates then serving.

Article V, Section 12(d) of the Pennsylvania Constitution provides as follows:

> "Except for officers completing their terms, after the first Monday in January, 1970, no judicial function of the kind heretofore exercised by these officers, (Aldermen, Justices of the Peace or Magistrates), by mayors and like officers in municipalities shall be exercised by any officer other than the one justice of the peace elected or appointed to serve in that magisterial district."

By the foregoing, any magisterial (judicial) function of a mayor or (like officers) was abolished and it is expressly provided that the judicial function, ". . . shall (not) be exercised by any officer other than one justice of peace elected or appointed to serve in that magisterial district." This provision trumpets an intent to eliminate the system

heretofore in effect which provided for municipal judicial functions. It is the demonstration of an intent, consistent with the entire meaning of the judicial article, to eliminate any vestige or a cloud on the separation of powers, and provide for a separate and independent judiciary, consistent with our traditional views of due process, under the aegis of the Supreme Court of Pennsylvania. The judiciary, as expressly stated in the Constitution is to be a "unified judicial system", State rather than local. Where a judicial officer is not totally independent, and removed from the will of the executive, the seeds of tyranny are present. It was to further that aim that the judicial article was adopted.

Quite simply, Article V of the Constitution of Pennsylvania does not create a special class of magistrates *appointed* rather than *elected,* appointed by the *Mayor* of the City of Pittsburgh rather than by the *Governor* of the Commonwealth, serving in Courts not established by the Constitution.

Query, then, did the recently enacted Judicial Code P.L. 586 at No. 142, made law on July 9, 1976, establish such a Court? The Constitution does provide that such is possible, when, in Section 1 of Article V, the Constitution provides, ". . . such other Courts as may be provided by law . . ." Sub-chapter C of the newly adopted judicial code, in Section 1141 provides, "the magistrates court shall be the police magistrates *authorized to be continued in existence by* Section 21, Schedule to Article V of the Constitution of Pennsylvania adopted April 23, 1968." (emphasis supplied). The judicial code then refers to the "City of Pittsburgh magistrates." The Judicial Code, obviously, did not *create* this court, and the other City of Pittsburgh

"Courts", but rather *presumed authorization* by Article V of the Constitution of Pennsylvania, which clearly did not authorize or establish such a court, as has already been demonstrated.

Taking the judiciary article as a whole, the conclusion is inescapable that those presently serving as "police magistrates of the City of Pittsburgh," other than those so serving at the time of the adoption of the Judicial Article, are not judicial officers, and that Traffic Court, the Housing Court and the City Court are, therefore, operating unconstitutionally.

Since these Courts are operating in violation of the Constitution, they are without legal authority to hear the charges brought against relators, to have bail set, and to have them bound over to the grand jury. If the magistrate has no authority to set bail, he detained relators and had them put on bail illegally. It is, thus, concluded that relators have been illegally held, and that their Petition for a Writ of Habeas Corpus must be granted.

Dated this 5th day of October, 1977.

PER CURIAM

(s) Flaherty, J.
Flaherty, *J.*

Opinion, Court of Common Pleas
Order

IN THE COURT OF COMMON PLEAS
OF ALLEGHENY COUNTY, PENNSYLVANIA
CIVIL DIVISION

No. 307 September 1975
No. 57 July Term, 1976

COMMONWEALTH EX REL., THERESA PAULINSKI, JAMES F. RICKARD and PATRICK K. FITZPATRICK

vs.

MICHAEL C. ISAAC and SCWARTZ-SILLS AGENCY

ORDER

FLAHERTY, J.

AND NOW, to-wit this 5th day of October, 1977, it is hereby ORDERED, ADJUDGED AND DECREED that the Pittsburgh City Magistrates who were not in office on the date the 1968 Pennsylvania Constitution was adopted, April 23, 1968, are hereby declared unconstitutional and illegal.

It is further ORDERED, ADJUDGED AND DECREED that the prayer of petitioners' Writ of Habeas Corpus be, and the same hereby is, granted, and petitioners are hereby discharged.

PER CURIAM
(s) Flaherty
Flaherty, *J.*

Opinion, Supreme Court

IN THE SUPREME COURT OF PENNSYLVANIA
Western District

Nos. 229, 230, 234 and 248 March Term, 1977

COMMONWEALTH ex rel. THERESA PAULINSKI; JAMES F. RICKARD and PATRICK K. FITZPATRICK

vs.

MICHAEL C. ISAAC and SCHWARTZ-SILLS AGENCY

Appeal of Intervenor City of Pittsburgh at Nos. 229 & 230

Appeal of Commonwealth of Pa. at Nos. 234 & 248

Appeal from the Order of October 5, 1977 of the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division at No. Misc. 307, September 1975 and Civil Division at No. Misc. 57, July 1976.

OPINION OF THE COURT

ROBERTS, J., FILED JAN. 24 1979:

Relators Theresa Paulinski, James F. Rickard, and Patricia K. Fitzpatrick were brought before Magistrate Stephen P. Laffey of a magistrate court of the City of Pitts-

burgh for preliminary hearings on various misdemeanor charges. Relators were held for court and released on bail. Relators then filed a petition for a writ of habeas corpus in the Court of Common Pleas of Allegheny County, naming their bonding company and its agents as defendants. The court of common pleas on September 25, 1975, directed the Commonwealth to respond and not to present relators' case to the grand jury until further order of the Court. On November 7, 1975, the court issued an order permitting the City to intervene. After a hearing, the court of common pleas, by opinion and order of October 5, 1977, held that the Constitution of 1968 abolished Pittsburgh magistrate courts and that no magistrate appointed after the adoption of the 1968 Constitution is a judicial officer. Magistrate Laffey was appointed after this time and the court therefore ordered the discharge of relators. The Commonwealth and the City of Pittsburgh appeal.[1]

Appellants assert that the court of common pleas erred both on procedural and substantive grounds. Their principal procedural objection is that relators' bailment leaves them without standing to challenge the court's jurisdiction. Further, appellants contend that the power of a court may be challenged only in a quo warranto proceeding and that petitioners have no remedy since quo warranto relief is exclusively prospective. On the merits, appellants argue that Pittsburgh magistrate courts were preserved by the Constitution of 1968, and is provided for by law.

We reject appellants' procedural claims, but hold that the Constitution of 1968 incorporates Pittsburgh magistrate

[1] We hear this appeal pursuant to the Appellate Court Jurisdiction Act of 1970, Act of July 31, 1970, P.L. 673, art. II, §202(a), 17 P.S. §211.202(9) (Supp. 1978).

courts into the unified judicial system of this Commonwealth. Accordingly, we vacate the October 5, 1977 order of the court of common pleas and remand for proceedings consistent with this opinion.

I.

Appellants maintain that a collateral challenge to the lawfulness of an exercise of judicial power cannot be made by a petition for a writ of habeas corpus, but can be made only in a quo warranto proceeding. While quo warranto has been characterized as the exclusive means by which to litigate title or right to public office, *D and B Auto Sales v. Commonwealth Dept. of State, State Bd. of Motor Vehicle Manufacturers, Dealers and Salesmen,* 29 Pa. Cmwlth. 113, 370 A.2d 428 (1977); *Leedom v. Thomas,* 473 Pa. 193, 373 A.2d 1329 (1977); *DeFranco v. Delardino,* 448 Pa. 234, 292 A.2d 299 (1972), the gravamen of the relators' complaint is unlawful custody as a result of an unconstitutional exercise of power. We have consistently held that the writ of habeas corpus may be used to test the legality of custody. E.g. *Commonwealth ex rel. Bryant v. Hendrick,* 444 Pa. 83, 280 A.2d 110 (1971), see *Commonwealth ex rel. Stevens v. Myers,* 419 Pa. 1, 213 A.2d 613 (1965), 2 Sm.L. 275 §§1 et seq., 12 P.S. §§1871 et seq. And although habeas corpus is not available until other remedies have been exhausted, e.g. *Bryant,* supra, the Great Writ has long been recognized as the only timely means of challenging the lawfulness of pre-indictment custody. *Commonwealth v. Hetherington,* 460 Pa. 17, 23, 331 A.2d 205, 209 (1975) ("The established and accepted method for testing a finding of a prima facie case pre-trial, within this jurisdiction, has been by a writ of habeas corpus"); *Common-*

wealth ex rel. Geisel v. Ashe, 165 Pa. Super. 41, 42, 68 A.2d 360, 361 (1949) (challenge to pre-indictment proceedings will not be entertained post-conviction); *Commonwealth ex rel. Scolio v. Hess,* 149 Pa. Super. 371, 27 A.2d 704 (1942) (writ granted before trial where Commonwealth evidence insufficient to hold in custody those bound over for trial by a magistrate).

Our concept of ordered law demands that a means of relief be available to relators unlawfully in custody. Since any pre-indictment jurisdictional defect will be corrected by the indictment or information procedure which follows, *Commonwealth v. Walker,* 243 Pa. Super. 388, 365 A.2d 1279 (1976) (allocatur denied), and because relief is unavailable to relators in a quo warranto proceeding, *State Dental Council and Examining Bd. v. Pollack,* 457 Pa. 264, 318 A.2d 910 (1974), the adoption of appellants' position would leave relators without any means of challenging jurisdictional defects in their preliminary hearing. We believe the writ of habeas corpus is suited to afford a remedy in these circumstances and, thus, reject appellants' claim.

Appellants, in addition, argue that since at the time the relators petitioned for relief they were released on bail, the issue of the lawfulness of their custody is moot and action on the merits of the petition is improper. By its very nature, a petition for a writ of habeas corpus is appropriate only where the relator is in "custody." See 2 Sm.L. 275, §1, 12 P.S. §1871; *Bryant,* supra. The relator need not be incarcerated, however, to meet this threshold requirement.

In *Commonwealth ex rel. Ensor v. Cummings,* 420 Pa. 23, 215 A.2d 651 (1966), this Court concluded, that

a habeas corpus proceeding on behalf of a parolee is not moot, "since, while on parole, the relator is subject to conditions and restrictions which restrain h[is] freedom." *Ensor,* 420 Pa. at 26, 215 A.2d at 652. In *Commonwealth ex rel. Stevens v. Myers,* 419 Pa. 1, 213 A.2d 613 (1965), the Court found the "custody" requirement satisfied by a relator who collaterally attacked the validity of a final judgment of sentence even though he had not yet begun to serve the sentence imposed. *Stevens,* 419 Pa. at 20, 213 A.2d at 624. We noted,

> "A refusal to permit the employment of the writ in the present circumstances would result in placing central emphasis on the history of the writ rather than upon its suitable employment in maintaining the balance 'nice, clear and true between the state and the accused.' "

The United States Supreme Court has concluded, similarly, that the "custody" requirement of the federal writ is satisfied by those not incarcerated as long as there are restraints on the petitioner's physical liberty, "not shared by the public generally." *Jones v. Cunningham,* 371 U.S. 236, 83 S.Ct. 373 (1963) (parolee in "custody"); see *Hensley v. Municipal Court,* 411 U.S. 345, 93 S.Ct. 1571 (1971) (petitioner released on his own recognizance pending execution of sentence in "custody").

The record demonstrates that relators were "subject to conditions and restrictions which restrained [their] freedom," *Ensor,* supra, and which are "not shared by the public generally." *Jones,* supra. They were not free to leave the City of Pittsburgh and were subject to immediate incarceration if they did so. In addition, they were subject

to appear in court at the demand, not only of the court, but also of their bonding company. We find the restraints on a petitioner bound over for court and released on bill sufficient to satisfy the custody requirement of a habeas corpus petition.[2]

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[2] Accord, e.g. *People v. Lent*, 529 P.2d 1317 (Colorado, en banc, 1975); *In re Cox*, 474 P.2d 992, 90 Cal. Rptr. 24, 3 Cal. 3d 205 (1970); *Lemme v. Langlois*, 244 A.2d 271 (R.I. 1968); *In re Philipie*, 414 P.2d 949 (Nev. 1966); *United States ex rel. Russo v. Superior Court of New Jersey*, 483 F.2d 7 (3d Cir.), cert. denied, 414 U.S. 1023, 94 S.Ct. 447 (1973); *Marden v. Purdy*, 409 F.2d 784 (5th Cir. 1969); *Burris v. Ryan*, 397 F.2d 553 (7th Cir. 1968). But see, e.g. *People ex rel. McLaughlin v. Monroe*, 353 N.Y.S.2d 33 (1974); *Ex parte Putnam*, 456 S.W. 2d 916 (Tex. Crim. App. 1970); *Matysek v. United States*, 339 F.2d 389 (9th Cir. 1964), cert. denied, 381 U.S. 917, 85 S.Ct. 1545 (1965). Cases collected at 77 A.L.R. 2d 1307.

We, thus, avoid the anomalous result of a petition for habeas corpus being available only to those who cannot afford bail. *Commonwealth v. Weinstein*, 177 Pa. Super. 1, 109 A.2d 235 (1954); *Commonwealth v. Lore*, 36 North. 271 (1961).

Appellants raise two other procedural claims. First, appellants question the authority of Judge Flaherty to preside over this criminal division proceeding, since he is permanently assigned to the civil division of the Court of Common Pleas of Allegheny County. Although judges must be assigned to a division of the court to which they are appointed or elected, Pa. R.J.A. 702.1, the Rules of Judicial Administration give the president judge of a court of common pleas the power temporarily to assign a judge from one division to another, "to expedite the business of the court." Pa. R.J.A. 702.2. By order, then President Judge Ellenbogen on February 27, 1976, assigned Judge Flaherty to this criminal docket case. Therefore, Judge Flaherty could properly hear this case.

Second, appellants argue that the trial court's order should be vacated because no habeas corpus proceeding should be brought

II.

We turn, therefore, to the merits of this appeal. The dispute between the parties essentially concerns the proper interpretation of section 21 of the Schedule to the Judiciary Article of the Constitution of 1968:

> "THE CITY OF PITTSBURGH
>
> INFERIOR COURTS
>
> Section 21. Upon the establishment of magisterial districts pursuant to this article and schedule, and unless otherwise provided by law, the police magistrates, including those serving in the traffic court, the housing court and the city court shall continue as at present. Such magistrates shall be part of the unified judicial system and shall be subject to the general

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on behalf of more than one relator. In support of this view they cite *Commonwealth ex rel. Panetta v. Hendrick*, 222 Pa. Super. 413, 294 A.2d 790 (1972) and *Ferree v. Douglas*, 145 Pa. Super. 447, 21 A.2d 472 (1941). *Ferree*, without authority, states that those confined under separate commitments cannot be discharged on one writ. *Panetta*, citing *Ferree*, reversed a decision which had reached the merits of a habeas corpus petition filed on behalf of more than one relator. No other jurisdiction follows the rule appellants would have us adopt. Indeed, a New York court has expressly rejected this proffered rule, *Supreme Court ex rel. Cardona v. Singerman*, 312 N.Y.S. 2d 229, 74 Misc. 2d 642 (Supreme Ct. 1970), and the federal courts consistently reach the merits of habeas petitions brought on behalf of more than one relator. E.g. *Britt v. McKenney*, 529 F.2d 44 (1st Cir. 1976) (complaint of five plaintiffs seeking class action declaratory judgment treated as habeas corpus petition); *Burgener v. California Adult Authority*, 407 F.S. 561 (N.D. Cal. 1976). We follow these jurisdictions and reject appellants' claim.

supervisory and administrative authority of the Supreme Court. Such magistrates shall be subject to the provisions of this article and schedule regarding educational requirements and prohibited activities of justices of the peace."

Appellants argue that this language preserves the inferior courts of the City of Pittsburgh, integrates them into the Pennsylvania judicial system and subjects magistrates sitting in accordance with this section "to the educational requirements and prohibited activities of justices of the peace."

Appellees maintain, however, that section 12(d) of the Schedule to the Judiciary Article abolishes all future magistrate positions. Section 12(d) provides:

> "Except for officers completing their terms, after the first Monday in January, 1970, no judicial function of the kind heretofore exercised by these officers, by mayors and like officers in municipalities shall be exercised by any officer other than the one justice of the peace elected or appointed to serve in that magisterial district."

Accordingly, appellees contend that the specific provisions of section 21, supra, merely permit those already serving as magistrates to remain in office, and establish additional requirements to be met by such "grandfathered" magistrates.

Constitutional provisions are not to be read in a strained or technical manner. Rather, they must be given the ordinary, natural interpretation the ratifying voter would give them. *Commonwealth v. Harmon*, 569 Pa. 490,

366 A.2d 895 (1976); *Beradocco v. Colden*, 469 Pa. 452, 366 A.2d 574 (1976). We conclude that section 21 is naturally read as an exception to the general provisions of section 12(d).

Appellees' reading of sections 12 and 21 of the Judicial Schedule makes implementation of the educational requirements provision of section 12(b) of Article V problematic. Article V, section 12 establishes standards to be met by magistrates, aldermen, and justices of the peace prior to assuming office.[3] It would be, at least, unclear how to apply this standard to magistrates already in office, who do not meet the requirements and who may continue in office only until their current terms expire. Further appellees constitutional interpretation would create a conflict between sections 12 and 21 of the Schedule. Sections 12(a) and (c) provide:

> "MAGISTRATES, ALDERMEN AND JUSTICES OF THE PEACE AND MAGISTERIAL DISTRICTS OTHER THAN IN THE CITY OF PHILADELPHIA
>
> Magistrates, Aldermen and Justices of the Peace
>
> Section 12. An alderman, justice of the peace or magistrate:

---

[3] Article V. section 12(b) reads:

"Judges of the traffic court in the City of Philadelphia and justices of the peace shall be members of the bar of the Supreme Court or shall complete a course of training and instruction in the duties of their respective offices and pass an examination prior to assuming office. Such courses and examinations shall be as provided by law."

(a) May complete his term, exercising the jurisdiction provided by law and with the method of compensation provided by law prior to the adoption of this article;

* * *

(c) At the completion of his term, his office is abolished."

On appellees' reading, section 12(c) absolutely abolishes the position of City of Pittsburgh magistrate after those whose terms are "grandfathered" serve out their terms of office. At the same time, section 12(a) unconditionally empowers those in office on January 1, 1970 to serve out their terms. But appellees' interpretation also forces one to read the first sentence of section 21 as allowing "grandfathered" magistrates to continue in office only as long as not "otherwise provided by law," and, thus, places a condition on their power to serve out their terms of office despite the clear language of Schedule Section 12(a) to the contrary. Appellants' interpretation of section 21 avoids a self-contradictory reading of the Constitution. "Grandfathered" magistrates, on their reading, are protected by section 12. Further, appellants argue that the language of section 21 of the Judicial Schedule contemplates that City of Pittsburgh magisterial courts may be eliminated by law, without constitutional amendment. On appellants' reading, those serving at a later date as Pittsburgh magistrates, should their jurisdiction ever be affected by law, will not be protected by the provisions of 12.

Appellees also direct our attention to the fact that at various times during the course of the Constitutional Convention, judicial articles and amendments were introduced which would have eliminated the Pittsburgh magistrate

courts.[4] We do not dispute that the Journals of the Constitutional Convention of 1968 may demonstrate that section 21 of the Judiciary Schedule was the result of compromise. Such a fact, however, does not alter either the clear and unequivocal meaning of the original language of the Pittsburgh magistrate courts' amendment adopted by the Convention,[5] or the standard by which we must decide this case.

Where, as here, we must decide between two interpretations of a constitutional provision, we must favor a natural reading which avoids contradictions and difficulties in implementation, which completely conforms to the intent of the framers and which reflects the views of the ratifying voter.

Order of the Court of Common Pleas of Allegheny County of October 5, 1977, discharging relators vacated,

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[4] I *Journal of the Convention* 9, 126 148, 152, 177, 183, 229, 312, 324, 402.

[5] Indeed, our interpretation is fully supported by the history of the Constitutional Convention. The section on the inferior courts of Pittsburgh was originally and finally adopted by the Convention on February 22, 1968. That section provided:

"Inferior Court in Pittsburgh.—Upon the establishment of magisterial districts pursuant to this article and schedule, unless otherwise provided by law, the traffic court and the housing court, the city court and the police magistrates in the City of Pittsburgh shall continue as at present. Such magistrates and courts shall be part of the unified judicial system of the Commonwealth and shall be subject to the general supervisory and administrative authority of the Supreme Court. Such magistrates shall be subject to the provisions of this article and schedule regarding educational requirements and prohibited activities of justices of the peace."

and case remanded for proceedings consistent with this opinion.

Former Justice Pomeroy and Mr. Justice O'Brien did not participate in the decision of this case.

It was adopted by a vote of 128 to 5 (30 not voting). This was the final action of the Convention as a whole on this section of the Schedule to the Judiciary Act of the 1968 Constitution. The Style and Drafting Committee was authorized to modify editorially the amendment after its adoption by the Convention, but had "no authority to change the sense or purpose of any proposal referred to it." I *J. Constitutional Convention* 12, Rule 22. The amendment passed by the Convention provided that the City of Pittsburgh magistrate court was to continue until expressly eliminated. We note that the Pittsburgh Home Rule Charter, approved in 1974 and effective as of January 5, 1976, explicitly provides for their continued existence as a part of the unified judicial system of the Commonwealth. See generally, Pa. Const. art. IX, §2, Act of April 13, 1972, P.L. 184, no. 62, 53 P.S. §§1-101 et seq. (1974).

SUPREME COURT OF PENNSYLVANIA
Western District

Nos. 229 and 234 March Term, 1977

COMMONWEALTH ex rel. THERESA PAULINSKI, JAMES F. RICHARD and PATRICIA K. FITZPATRICK

v.

MICHAEL C. ISAAC and SCHWARTZ-SILLS AGENCY
Intervenor City of Pittsburgh, Appellant at No. 229
Appeal of Commonwealth of Pennsylvania at No. 234

JUDGMENT

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the Court of COMMON PLEAS OF ALLEGHENY COUNTY, CRIMINAL DIVISION, be, and the same is hereby vacated and case remanded for proceedings consistent with this opinion.

BY THE COURT:
(s) Sally Mrvos
Sally Mrvos, Esquire
Prothonotary

Dated: January 24, 1979

Judgments of the Supreme Court

SUPREME COURT OF PENNSYLVANIA
Western District

Nos. 230 and 248 March Term, 1977

COMMONWEALTH ex rel. THERESA PAULINSKI, JAMES F. RICHARD and PATRICIA K. FITZPATRICK

v.

MICHAEL C. ISAAC and SCHWARTZ-SILLS AGENCY
Intervenor City of Pittsburgh, Appellant at No. 230
Appeal of the Commonwealth of Pennsylvania at No. 248

JUDGMENT

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the Court of COMMON PLEAS OF ALLEGHENY COUNTY, CIVIL DIVISION, be, and the same is hereby vacated and case remanded for proceedings consistent with this opinion.

BY THE COURT:
(s) Sally Mrvos
Sally Mrvos, Esquire
Prothonotary

Dated: January 24, 1979

Denial of Reargument

THE SUPREME COURT OF PENNSYLVANIA
Western District

801 City-County Building
Pittsburgh, Pa. 15219
March 2, 1979

Allen N. Brunwasser, Esquire
903 B Grant Building
Pittsburgh, Pa. 15219

In Re: Commonwealth ex rel. Paulinski, et al., v. Isaac, et al. Nos. 229, 230, 234 and 248 March Term, 1977

Dear Mr. Brunwasser:

This is to advise you that your Petition for Reargument filed in the above-captioned matter has been denied by the Court on February 28, 1979.

Very truly yours,
(s) Sally Mrvos
Prothonotary

SM: erv
cc: Robert L. Eberhardt, Esquire
Marvin A. Fein, Esquire

CONSTITUTION OF UNITED STATES

5TH AMENDMENT

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

14TH AMENDMENT

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."